

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

OFFSHORE EXPRESS, INC.,

Respondent.

**Docket No. FMCSA-2009-0317¹
(Eastern Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. Background

On September 1, 2009, the Rhode Island Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) issued a Notice of Claim (NOC) against Offshore Express, Inc. (Respondent) following a roadside inspection conducted on June 19, 2009. The NOC charged Respondent with one violation of 49 CFR 392.9a(a)(1), operating a commercial motor vehicle without the required operating authority, and proposed a civil penalty of \$590.²

After Respondent failed to respond to the NOC, the FMCSA's Field Administrator for the Eastern Service Center (Claimant) served a Notice of Default and Final Agency Order (NDFAO) on October 7, 2009. The NDFAO advised Respondent that the NOC would become the Final Agency Order in this proceeding effective October 13, 2009, with the civil penalty immediately due and payable on that date.³

On October 19, 2009, Respondent served a Petition for Reconsideration claiming that it delegated the responsibility for the NOC reply to its insurance agent, because Respondent's

¹ The prior case number was RI-2009-0060-US1203.

² See Exhibit A to Field Administrator's Response and Opposition to Petition for Reconsideration (Claimant's Response).

³ See Exhibit B to Claimant's Response.

President's wife was undergoing surgery, and did not realize that the matter was not being handled properly. Respondent requested a formal hearing, but did not deny that it operated without operating authority as alleged in the NOC. It claimed that the revocation of its operating authority was the result of an error by its insurance underwriter in entering the incorrect policy effective date.

On November 5, 2009, Claimant responded to the Petition for Reconsideration, arguing that the petition be denied because Respondent defaulted by failing to timely reply to the NOC and did not set forth any basis for reconsideration of the Final Agency Order.

2. Decision

Because Respondent did not reply to the NOC within 30 days of service of the NOC, as required by 49 CFR 386.14(a), it defaulted.⁴ Under 49 CFR 386.64(b), a Notice of Default and Final Agency Order issued by a Field Administrator based on failure to timely reply to the NOC may be vacated if Respondent can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

Respondent failed to meet its burden of demonstrating that the Final Agency Order should be vacated. Respondent attributed its failure to timely respond to the NOC to inaction by its insurance agent. However, I have previously held that the failure of a carrier's agent to carry out his responsibilities with respect to replying to an NOC on behalf of a respondent does not constitute excusable neglect.⁵ Moreover, Respondent did not present a meritorious defense to

⁴ The NOC reply deadline was October 6, 2009. This date was calculated by adding 30 days to the September 1, 2009 service date of the NOC and an additional five days because the NOC was served by mail. See 49 CFR 386.8(c)(3).

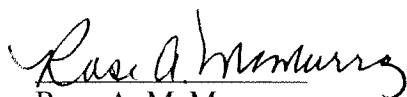
⁵ See *In the Matter of Short Hop Moving, Inc.*, Docket No. FMCSA-2008-0243, Order Denying Petition for Reconsideration, January 7, 2010, at 3.

the charge. It admitted that it operated without the necessary authority, but claimed that its operating authority would have been reinstated had its insurance underwriter entered the correct policy effective date. This allegation does not contest the fact that Respondent operated without operating authority and does not demonstrate a meritorious defense.

Section 386.64(b) authorizes—but does not require—the Assistant Administrator to vacate the Final Agency Order if Respondent acts with due diligence in seeking relief. Even if, for the sake of argument, Respondent acted with due diligence, it would be an empty exercise or futile gesture to vacate the Final Agency Order because it did not demonstrate a meritorious defense.⁶

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding. The civil penalty of \$590 is due and payable immediately. Payment may be made electronically through FMCSA's registration site at <http://safer.fmcsa.dot.gov> by selecting "Online Fine Payment" under the "FMCSA Services" category. In the alternative, payment by cashier's check, certified check, or money order may be remitted to the Claimant at the address shown in the Certificate of Service.

It Is So Ordered.



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

8.23.10
Date

⁶ See *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration, October 8, 2008, at 5.

CERTIFICATE OF SERVICE

This is to certify that on this 54 day of August, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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